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March 15, 2010

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Via Hand-Delivery

Jason King
Acting Nevada State Engineer
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701

**Re: Nevada State Engineer Workshop Concerning *Great Basin Water Network*
Et al. v. State Engineer and Southern Nevada Water Authority
126 Nevada Advance Opinion 2, January 28, 2010
Our File No. 9476.0030**

Dear Mr. King:

I am writing this letter on behalf of the Truckee Meadows Water Authority. As you know, since 1977, I have been active in water matters in Nevada. I am also writing this letter as one who has and continues to represent persons and entities who hold Nevada water rights for a wide variety of beneficial uses.

At the conclusion of the recently completed 26th Special Session of the Nevada Legislature, the Nevada Legislature requested that the State Engineer work with interested parties to find a way to resolve the uncertainties and instability created in Nevada's water law by the Nevada Supreme Court's recent decision in *Great Basin Water Network v. State Engineer*, 126 Nevada Advance Opinion 2 (January 28, 2010). The uncertainty and instability arise because the broad holding in *Great Basin Water Network* suggests that applications on file with the Nevada State Engineer more than one year prior to July 1, 2003, may either have to be renoticed or refiled, even if subsequent to July 1, 2003, those applications were approved by the Nevada State Engineer. Although I firmly believe that the *Great Basin Water Network* holding should be substantially narrowed in future litigation involving other parties and different facts, interested and affected parties should not be left vulnerable to costly and lengthy litigation. That is especially true when the issue results from a misinterpretation of a legislative act that was intended to avoid these very problems in the first instance.

Background.

The Supreme Court's decision on this broad issue appears to be the result of its misinterpretation of the Legislature's intent with respect to Chapter 474 of the 2003 Laws of the State of Nevada. There, the Legislature determined that two provisions were to apply to "each such application that is pending with the office of the State Engineer on July 1, 2003." The two provisions which were to apply to such pending applications are:

(2) Except as otherwise provided in this subsection and subsection 7, the State Engineer shall approve or reject each application within one year after the final date of filing a protest. The State Engineer may:

* * *

(b) Postpone action if the purpose for which the application is made is municipal use.

* * *

3. If State Engineer does not act upon an application within one year after the final date for filing a protest, the application remains active until acted upon by the State Engineer.

The Nevada Supreme Court decided that the word "pending" did not include any applications which had been on file with the State Engineer longer than one year before the July 1, 2003 effective date of the Act.

The notion that an application which has been pending before the Nevada State Engineer longer than one year after the final date for filing of a protest cannot be acted upon, and must either be refiled or renoticed, is plainly inconsistent with the manner in which the Nevada State Engineer has historically applied the one year provision since it was added to Nevada's water law in 1947. I am unaware of any instance or situation where, because an application had not been acted upon within one year after the final date for filing a protest, the Nevada State Engineer required that the application be renoticed or refiled. That provision has not been interpreted and applied in that fashion for the 63 years that it has been in existence.

Because it has not been applied in that fashion for the last 63 years, there are hundreds, if not thousands, of such applications which were subsequently approved. Since approval, they have been relied upon by their owners to support every beneficial use allowed under Nevada's water law. The solution arrived at for restoring the stability and consistency in the administration of Chapter 533 and 534 of the Nevada Revised Statutes upset by this decision should not turn on the ultimate result one believes should be reached in the *Great Basin Water Network* case. The merits of *Great Basin Water Network* involve broader and more significant questions than the technicality used to either require renoticing or refile of those applications. The proper solution must be arrived at by considering its importance to those water right holders who, over the last 63 years, have applied for and received approval of applications more than one

year after the final date for filing a protest, and who are not now embroiled in, and who should not be placed in the position of having to become embroiled in, litigation.

At the outset, it is important to recognize that an applicant or a protestant, including those involved in *Great Basin Water Network*, is not without a remedy should the State Engineer fail to act within the one year period without satisfying one of the exceptions which allows for the postponement of action. To the extent that the one year requirement is a duty imposed upon the State Engineer by law, and it appears that that is an essential element of the ruling of the Supreme Court in *Great Basin Water Network*, an applicant or protestant would be entitled to compel action pursuant to a writ of mandamus filed either with a district court or in the Supreme Court. *C.f., Roundhill General Improvement District v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). That remedy was available to either the applicant or the protestants in the *Great Basin Water Network* case, and for whatever reason, none of them chose to exercise it.

The Propriety of a Legislative Solution.

It is entirely appropriate to ask that the legislature address an issue arising from a court's interpretation of a statute and a subject matter properly in the legislative sphere. There are at least two Nevada water law examples where this has occurred. In *In Re Waters of Duff Creek*, 66 Nev. 17, 202 P.2d 535, the Nevada Supreme Court, deciding not to overrule an earlier Nevada Supreme Court case, *Authors v. Bryant*, 22 Nev. 242, 38 P. 439 (1894), held that a right to use water could be acquired by adverse use. Recognizing that its decision had the potential to upset one of the principal purposes of Nevada's comprehensive water law, that "order replace chaos in the appropriation, distribution and use of public water," the Supreme Court noted:

"As the 44th Session of the Nevada State Legislature has now convened, we direct the attention of the Legislature to the problem. We have found in compliance with our constitutional system of assigning separate powers to the executive, legislative and judicial branches of the government, that the fixing of a policy in this matter lies more properly in the sphere of the legislature, but we do not overstep in pointing out the problem nor in submitting for consideration our thoughts upon it."

66 Nev. at 29. That decision was made on January 28, 1949, and the Nevada Legislature amended the water law to effectively overturn its holding as of March 17, 1949.

In 1992, a Nevada district court, and in 1993, the United States Court of Appeals for the Ninth Circuit, ruled that under Nevada law one could not change the point of diversion, place of use, or manner of use of water unless the right to that water had been fully perfected by having been diverted at its permitted point of diversion and applied to its permitted manner of use at its permitted place of use. *See, United States v. Alpine Land and Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993); *Pyramid Lake Paiute Tribe of Indians, et al. v. R. Michael Turnipseed, et al.*, in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, No. CV-

91-2231 (August 31, 1992 Order). In reaching those conclusions, these courts interpreted the phrase "water already appropriated" in N.R.S. 533.325 and 533.345 to mean that the change sought must involve a right to water which had been fully perfected under state law.

After reviewing how the phrase "water already appropriated" had been historically interpreted and applied by the Nevada State Engineer, and after considering the importance of the proper interpretation of that term to present and future appropriators, and its consistency with sound water law policy, the Nevada Legislature approved Assembly Bill 337, which, in Section 1, provided that "water already appropriated includes water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made." 1993 Laws of Nevada, Chapter 181 at 321. In section 2 of that bill, the Legislature declared that it had "examined the past and present practice of the State Engineer with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water, and finds that those applications had been approved or denied in the same manner as applications involving water applied to the intended use before the application for change was made." The Legislature further declared that its intent was to "clarify, rather than change, the operation" of the relevant provisions in Nevada law, and to "thereby promote stability and consistency in the administration of chapters 533 and 534 of N.R.S." The Legislature ratified and approved each approval granted by the State Engineer before the effective date of the Act for a change in place of diversion, manner of use or place of use of water already appropriated, if the change was consistent with the interpretation of that term codified in Section 1 of the Act. Finally, the Legislature provided that the Act became effective upon passage and approval, and to the extent that it ratified previous decisions of the State Engineer in the manner described in Section 2 of the Act, "applied retrospectively as well as prospectively."

Proposed Legislation.

The Truckee Meadows Water Authority urges the State Engineer to recommend a similar solution here. The instability and uncertainty created by *Great Basin Water Network* is best resolved by addressing the decision squarely and directly. The solution should clarify that in 2003 the Nevada Legislature intended that the amendments in section 2 of Chapter 474 apply to all applications, whether filed before or after July 1, 2003. It is especially important that it be made clear that the provisions of N.R.S. 533.370(4) are and always have been the law with respect to applications which have not been acted upon within the one year period. The Truckee Meadows Water Authority therefore suggests the following language for consideration by the State Engineer and ultimately the Nevada legislature:

AN ACT relating to water, clarifying certain statutory provisions to reflect established practice; and providing other matters properly related thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT A FOLLOWS:

Sec. 1. Section 18 of Chapter 474 of the 2003 laws of the State of Nevada is hereby amended to read as follows:

Sec. 18. The amendatory provisions of section 2 of this act apply to:

1. Each application described in NRS 533.370 that is made on or after July 1, 2003; and
2. Each such application that is pending with the office of the State Engineer on July 1, 2003, *without regard to how long before July 1, 2003 each such application was filed with the office of the State Engineer.*

Sec. 2. 1. The legislature declares that it has examined the past and present practice of the state engineer with respect to the approval or denial of applications as such approval or denial relates to their pendency on and before July 1, 2003, and finds that those applications have been approved or denied in a manner consistent with section 1 of this act.

2. The legislature intends by this act to clarify rather than change the operation of Section 18 of Chapter 474 of the 2003 laws of the State of Nevada with respect to the approval or denial of applications described in section 1 of this act, and thereby to promote stability and consistency in the administration of chapters 533 and 534 of NRS.

Sec. 3. This act becomes effective upon passage and approval, and applies retrospectively as well as prospectively.

The solution proposed by the Truckee Meadows Water Authority protects existing water rights, protects the status of pending applications, preserves priorities, and allows the application of protest period provisions to continue to be applied as previously applied by the Office of the Nevada State Engineer over the 63 year period since the 1947 amendment to Nevada's water law established the one year action provision.

Consideration of a Rule Allowing Intervention.

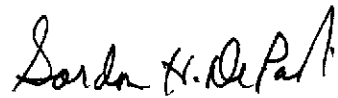
The adage "hard cases make bad law" is applicable to the *Great Basin Water Network* case. It appears that, in part, this case results from the inability of some persons to participate fully in the hearings on the applications which were at issue. I recognize that, in recent times, hearings before the State Engineer, particularly in situations involving large interbasin transfers of water, have become cumbersome, time consuming, and expensive. Nevertheless, I suggest that the State Engineer give consideration to a regulation which would allow intervention of persons who have a significant interest in a matter, but who, for some good reason, did not file a timely protest.

Jason King
Acting Nevada State Engineer
March 15, 2010
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I suggest that your Office review the provisions of the Nevada Administrative Code concerning intervention before the Public Utilities Commission of Nevada. Those provisions are at N.A.C. §§ 703.578 to 703.600. There may be some aspects of those provisions which might work for your Office.

I and my client appreciate the opportunity to provide our comments on this urgent and important issue.

Sincerely,



Gordon H. DePaoli

GHD:hd

cc: Mark Foree
John Erwin
Steve Walker

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STATE ENGINEER'S OFFICE